

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**IA NO. 870 OF 2017  
IN  
APPEAL NO. 333 OF 2017**

**Dated: 22<sup>nd</sup> November, 2017.**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson  
Hon'ble Mr. I.J. Kapoor, Technical Member**

**In the matter of:-**

**ESSAR POWER GUJARAT LIMITED )**  
Salaya Administrative Building, 44 KM, )  
Jamnagar-Okhla Highway, Post Box )  
No.7, At Post Khambhaliya, Dist. )  
Jamnagar – 361305 ) **... Appellant**

**AND**

1. **THE SECRETARY, )**  
**CENTRAL ELECTRICITY )**  
**REGULATORY COMMISSION, )**  
3<sup>rd</sup> and 4<sup>th</sup> Floor, Chanderlok )  
Building, 36, Janpath, New Delhi – )  
110001. )

2. **THE CHAIRPERSON, )**  
**POWER GRID CORPORATION OF )**  
**INDIA LIMITED, "SAUDAMINI", )**  
Plot No. 2, Sector 29, Near IFFCO )  
Chowk, Gurgaon (Haryana) – )  
122001. ) **.... Respondent (s)**

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.  
Mr. Sakya Singha Chaudhuri  
Mr. Avijeet Lala  
Mr. Anand Kr. Shrivastava  
Ms. Molshree Bhatnagar  
Mr. Shivam Sinha  
Ms. Shruti Verma

Counsel for the Respondent(s): Mr. Sanjay Jain, ASG  
Mr. Gopal Jain, Sr. Adv.  
Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Mr. Chinmay Chandra  
Ms. Rhea Luthra for R.2

**: O R D E R :**

1. In this application, the Appellant - Essar Power Gujarat Limited has prayed that operation of the impugned order dated 11.10.2017 passed by the 1<sup>st</sup> Respondent, i.e. Central Electricity Regulatory Commission ("**the CERC**") in Petition No. 187/MP/2015 be stayed till the present appeal is disposed of and letter dated 12.10.2017 issued by the Power Grid Corporation of India Limited ("**PGCIL**") which is Respondent No. 2 herein, in relation to invocation of Bank Guarantee (BG No. 00040100005273) of INR 112 Cr. having validity till 04.11.2017 be kept in abeyance.

2. Facts necessary for the disposal of the instant application need to be stated. An application was made by the Appellant for Long Term Access for 2300 MW to PGCIL vide its application dated 25.09.2008. The Appellant intended to increase the capacity of the generation project to 4440 MW in three phases. On 02.07.2009, the Appellant made a request to PGCIL for system studies for evacuation of power of 3240 MW Essar Salaya Power Project in Gujarat from Phases II and III. On 17.07.2009, Environmental Clearance for Phase 1 of the Generation Project was granted by Ministry of Environment and Forest. On 18.07.2009, the Appellant made a request to PGCIL for system studies for evacuation of revised capacity. On 09.02.2010, the Appellant made an application for grant of connectivity and long term access for 3040 MW in Western Region (Salaya Power Project). On 08.07.2016, meeting of WR Constituents regarding Connectivity/Open Access Applications was held and vide letter dated 14.09.2010, PGCIL conveyed the approval for connectivity to the Appellant for 2440 MW effective from 01.06.2012 at 400 KV Bachau Sub-station. The Appellant entered into a Transmission Agreement dated 03.01.2011 with PGCIL, under which connectivity granted was for 2240 MW and the

connectivity line namely 400 KV Essar (Salaya) TPS Bachau D/C (Triple line) was to be implemented by PGCIL in a time period of 9 months plus CERC timeline from zero date i.e. signing of the Transmission Agreement (03.01.2011) or furnishing of Bank Guarantee whichever is later. On 09.02.2011, the Appellant issued a Bank Guarantee for an amount of Rs. 112 Cr. in favour of PGCIL for an initial validity period up to 04.11.2014 in terms of clause 5.0 (b) of the Transmission Agreement dated 03.01.2011. The Appellant applied for 250 MW on 03.03.2011. On 05.08.2011, LTA for 250 MW was granted to the Appellant. The Appellant signed LTA agreement dated 14.12.2011 with PGCIL for 250 MW valid for 25 years.

3. It appears that on 17.08.2012, a letter was written by the Appellant to PGCIL requesting for extension of execution period of 400 KW Salaya Bachau line and informing PGCIL regarding force majeure events (pending statutory clearances). Another letter was sent on 06.07.2013. PGCIL by its letter dated 26.07.2013 rejected the Appellant's request for extension of execution period. On 08.09.2014, PGCIL wrote a letter to Axis Bank stating that in case the Appellant fails to extend INR 112

Cr. Bank Guarantee, the same will be deemed to be encashed by PGCIL. By letter dated 31.10.2014, the Appellant informed PGCIL that the line being under construction does not meet N-1 criteria as required by the CEA and Indian Grid Code and accordingly refused to provide Bank Guarantee to PGCIL beyond Rs.12.5 Cr. which was calculated at Rs.5 lakhs/MW for 250 MW. On 03.11.2014, the Appellant filed Petition No.440/MP/2014 in the CERC on the question of quantum of Bank Guarantee that the Appellant, in law, is required to furnish to PGCIL. The Appellant questioned the entitlement of PGCIL to the quantum of Bank Guarantee under the Transmission Agreement dated 03.01.2011 and LTA Agreement dated 14.12.2011.

4. On 27.01.2015, PGCIL filed a transmission petition before the CERC for approval of the transmission tariff for the said transmission lines and for extension of Bachau sub-station. The Appellant filed its objection to the tariff petition on the ground that PGCIL has constructed the transmission lines in disregard of its statutory obligations under clauses (b) (iv) and (c) of sub-section (2) of Section 38 of the Electricity Act 2003 (**“the said**

**Act**”) and despite prior intimation of prevailing force majeure conditions faced by the Appellant.

5. On 12.08.2015, the Appellant filed Petition No. 187/MP/2015 (instant petition) raising a dispute under the Transmission Agreement dated 03.01.2011 between the Appellant and PGCIL. The Appellant sought direction regarding the existence of force majeure conditions preventing the Appellant from initiating work on Phase II of the generation project. Following prayers were made in the petition.

- “(a) Declare that Petitioner is entitled to claim force majeure in terms of Clause 8 of the Transmission Agreement in the facts and circumstances of the case and declare the act of rejection of the force majeure circumstances of the Petitioner by the Respondent as bad in law;*
- (b) Pass appropriate direction for keeping in abeyance of connectivity till the revised date of commissioning of the generating project is intimated/communicated by generators to the Respondent;*
- (c) Restrain the Respondent from making any claims for transmission charges for the connectivity in respect of connectivity of line till commissioning of the project;*
- (d) In interim, grant a stay on the Respondent from raising any invoice for transmission charges pending disposal of the present petition”.*

6. The Appellant submitted that the Appellant had vide its letter dated 17.08.2012 informed PGCIL about the pending environmental clearance and had requested for extension of connectivity and LTA from March 2014 to March 2016, but the PGCIL without paying any heed to letter dated 17.08.2012, proceeded with construction of the transmission line in October 2012. The Appellant had vide its letter dated 06.07.2013 intimated PGCIL about the force majeure event in terms of Article 8.0 of the Transmission Agreement dated 03.01.2011 affecting the generation project of the Appellant as delay in obtaining forest clearance was beyond the Appellant's control, however, PGCIL summarily rejected the Appellant's case of force majeure and decided to continue with generation project without assigning any reasons. According to the Appellant after PGCIL was intimated about the delay in commencement of Phase II of the generation project, PGCIL could have diverted its men and materials towards other projects rather than its insistence to continue with the transmission project. This approach of PGCIL is inconsistent with mandate of Sections 38(2) (b) (iv) and 38 (2) (c) of the said Act. PGCIL on the other hand submitted that it has

acted prudently. PGCIL submitted that letter dated 17.08.2012 is not a notice of force majeure. It is only a request to delay operationalisation of Long Term Access. The Appellant vide its letter dated 06.07.2013 for the first time asked for keeping the commissioning of the transmission system in abeyance. PGCIL further submitted that it was under no obligation to put in abeyance all the activities related to transmission system because PGCIL is under the statutory obligation to proceed to implement the transmission system. If the Appellant did not want the LTA, it could have relinquished the same by following the procedure prescribed in the Connectivity Regulations. Not having done so, the Appellant cannot escape the liability to pay transmission charges to PGCIL.

7. On 25.08.2015, the CERC reserved the order in Petition No.187/MP/2015. On 29.01.2016, the CERC issued order in Petition No.440/MP/2014 filed by the Appellant. The CERC directed the Appellant to extend the Bank Guarantee of INR 112 Cr. for 2240 MW corresponding to the capacity of the connectivity line till opening of payment security mechanism and operationalization of LTA. PGCIL was directed not to encash the

Bank Guarantee till the opening of payment security mechanism for operationalization of LTA. The Appellant challenged the said order in this Tribunal vide Appeal No.237 of 2017. The said appeal is admitted on 13.09.2017. This Tribunal has however not granted interim stay to the CERC's order dated 29.01.2016.

8. The CERC disposed of Petition No.187/MP/2015 vide order dated 11.10.2017 which is impugned in the instant appeal. The CERC held that the Appellant's letters dated 7.08.2012 and 06.07.2013 can be treated as notices of force majeure under Article 8 of the Transmission Agreement. The CERC further held that the Appellant is not covered under Article 8.0 of the Transmission Agreement and is liable to pay the transmission charges unless it relinquished connectivity on payment of relinquishment charges for the connectivity line.

9. The CERC further held that execution of the subject transmission line was carried out by PGCIL on account of the failure of the Appellant to provide clarity whether the transmission system is required or not. However, PGCIL in its capacity as CTU should have taken a proactive role to ensure

coordinated execution and avoid mismatch between the commissioning of the generating station and transmission system.

10. The CERC further held that the transmission line has been constructed as a connectivity line of evacuation of power from Phase II of the generating station of the Appellant. The CERC held that since the Appellant's claim for force majeure has been rejected and since the transmission system has been executed based on the connectivity granted and the Transmission Agreement is signed, the Appellant has to either use the connectivity and pay the transmission charges or continue to pay the transmission charges till the transmission line is utilised or pay the transmission charges if it intends not to use the connectivity. The CERC further observed that PGCIL is also entitled to encash the bank guarantee in terms of Article 5.0 (c) of the Transmission Agreement on account of adverse progress of the generation project. The CERC further observed that there is no provision for keeping the connectivity and LTA of the transmission line in abeyance which will result in non-recovery of the investment made. The CERC observed that the Appellant

cannot be exempted from paying the transmission charges for the subject transmission line.

11. The CERC further observed that till alternative arrangements for utilisation of the said transmission line, the Appellant shall continue to pay the transmission charges as determined by the CERC. The CERC reiterated that PGCIL is at liberty to encash the bank guarantee for adverse progress of the generating station of the Appellant and the same on recovering shall be adjusted against capital cost of the subject transmission project.

12. The CERC further observed that PGCIL should have explored the possibility of the short closure of the contract seeing adverse progress of the generation project and claimed damages from the Appellant which PGCIL was liable to pay to the OEM contractor and meet other related expenditure.

13. On 12.10.2017, PGCIL invoked the Bank Guarantee of Rs.112 Cr. on the basis of the order dated 11.10.2017 passed in Petition No.187/MP/2015. The Appellant filed a writ petition

before the Delhi High Court seeking ad-interim injunction against encashment of Bank Guarantee by the PGCIL. The Delhi High Court granted stay upto 17.10.2017 on encashment of the Bank Guarantee till the Appellant files a statutory appeal in this Tribunal. On 23.10.2017, the instant appeal filed by the Appellant was admitted by this Tribunal. This Tribunal has extended the stay granted by the Delhi High Court till the disposal of the present interim application. The Appellant was directed to renew the Bank Guarantee of INR 112 Cr. before 31.10.2017.

14. We have heard Mr. Sanjay Sen, learned counsel appearing for the Appellant. We have also perused the written submissions filed by him. Gist of the submissions is as under:

- (a) Paragraph 5(b) of the Transmission Agreement dated 03.01.2011 provides the manner of calculation of Bank Guarantee as “5 (Lakhs)/MW”. In this case, the capacity for which the connectivity is required is 2240 MW, which equals to INR 112 Cr. (5 Lakhs x 250 MW). The actual service/access

provided by PGCIL is only to the tune of INR 21.5 Cr. (5 Lakhs x 250 MW) since the capacity of connectivity is only 250 MW and not for INR 112 Cr.

(b) In the circumstances, the amount of Bank Guarantee furnished by the Appellant far exceeds the amount of Bank Guarantee the Appellant is required to furnish. The Appellant has disputed the quantum of Bank Guarantee. The said issue is to be decided by this Tribunal in Appeal No.237 of 2017 filed by the Appellant. The legal entitlement of PGCIL on the entire Bank Guarantee of INR 112 Cr. is yet to be adjudicated by this Tribunal in the said appeal.

(c) PGCIL has been negligent in developing the subject transmission asset. It has derogated the statutory and contractual obligations and gone ahead with the construction of transmission assets. The CERC has expressed displeasure about PGCIL's

conduct in paragraphs 31 and 33 of the impugned order.

(d) The letter dated 12.10.2017 issued by PGCIL to Axis Bank invoking Bank Guarantee is not in terms of the Bank Guarantee Agreement dated 09.02.2011. The Bank Guarantee dated 09.02.2011 has been provided towards the Transmission Agreement dated 03.01.2011. However, in the invocation letter dated 12.10.2017, there is a reference to clause 6.0 of the LTA Agreement dated 14.12.2011.

(e) The Agreement, dates, quantum of LTA capacity and the clause of the said Agreement have been wrongly quoted. The Appellant and PGCIL have entered into a Transmission Agreement dated 03.01.2011 for the quantum of 2240 MW connectivity to be provided by PGCIL. This agreement is independent of the agreement quoted by PGCIL in the letter dated 12.10.2017. The LTA

Agreement dated 14.12.2011 has been signed for 250 MW access to South Region. Therefore, if at all, PGCIL has a claim over Bank Guarantee, it is only to the extent of INR 12.5 Cr.

(f) The impugned proceedings under which PGCIL has purportedly been claiming its right to encash Bank Guarantee, were only in relation to disputes and differences arising out of the Transmission Agreement dated 03.01.2011 signed between the Appellant and PGCIL. The CERC has now given PGCIL right to encash Bank Guarantee under a LTA Agreement dated 14.12.2011, where the original proceedings are only in relation to the Transmission Agreement dated 03.01.2011.

(g) It is a settled law that if the invocation of Bank Guarantee is not in terms of the Bank Guarantee Agreement, the invocation itself is bad in law.

**[Hindustan Construction Co. Ltd. v. State of**

**Bihar & Ors.**<sup>1]</sup>. Therefore, the letter dated 12.10.2017 issued by PGCIL to Axis Bank invoking the Bank Guarantee is bad in law since the same is in contravention of the clear terms of the Bank Guarantee Agreement dated 09.02.2011.

- (h) As per the terms of the Bank Guarantee, PGCIL cannot encash the Bank Guarantee where the estimated transmission charges have not yet been adjudicated/determined by the Commission.
  
- (i) The terms and conditions recorded in the Bank Guarantee Agreement dated 09.02.2011 are in furtherance to the commitment made between the Appellant and PGCIL at Clause 5.0(b) of the Transmission Agreement dated 03.01.2011. The Bank Guarantee can only be invoked if the Appellant fails/delays constructing station or making exit or abandoning its project. Consequently, PGCIL has a right to collect

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<sup>1</sup> (1999) 8 SCC 436

estimated transmission charges. These transmission charges would be towards the standard capacity of the dedicated line to compensate the damages. The letter of invocation dated 12.10.2017 issued by the PGCIL does not adhere to the above express terms of the Bank Guarantee Agreement dated 09.02.2011.

- (j) The transmission lines have been provided only to the extent of 250 MW. Therefore, the transmission charges payable, if any, will be to the extent of 250MW. However, this has to be determined based on the force majeure events claimed by the Appellant.
  
- (k) The entitlement of PGCIL to encash the Bank Guarantee amount is towards compensating itself due to damage that may be suffered because of the Appellant. The party claiming damages / compensation is debarred from claiming any damages arising out of its own neglect. The onus

is upon him to mitigate losses consequent to the breach of contract. [**M. Lachia Shetty & Sons Ltd. v. Coffee Board Bangalore**<sup>2</sup>]. The failure of PGCIL to establish efforts to mitigate losses debars it from having any claim against the Appellant.

- (l) Misrepresentation while encashing the Bank Guarantee has been viewed seriously by the courts. (**M/s. Synthetic Foams Limited v. Simplex Concrete Piles India Pvt. Ltd.**<sup>3</sup>).
- (m) Being an independent commercial contract, the terms of the Bank Guarantee are required to be complied with strictly. Bank Guarantee is required to be construed strictly (**Larson & Toubro Limited v. Allahabad Bank**<sup>4</sup>).

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<sup>2</sup> AIR 1981 SC 162

<sup>3</sup> 1987 SCC OnLine DEL 344

<sup>4</sup> Judgment dated 20/06/2016 of the Bombay High Court in Appeal (L) No.106 of 2016

(n) This case is covered by the Supreme Court's judgment in **Gangotri Enterprises Limited v. Union of India & Ors.**<sup>5</sup>

(o) In view of the above, it is clear that the Appellant has a prima facie case and if the reliefs prayed in the application are not granted, irreparable harm and legal injury will be caused to the Appellant.

15. We have heard Mr. Sanjay Jain, learned ASG and Mr. Gopal Jain, learned counsel appearing for Respondent No.2. We have also perused the written submissions filed by them. Gist of the submissions is as under:

(a) The Bank Guarantee has been submitted by the Appellant on 09.02.2011, pursuant to the signing of the Transmission Agreement on 03.02.2011, whereas the LTA has been applied by the Appellant on 03.03.2011 followed by the LTA Agreement on 14.12.2011.

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<sup>5</sup> (2016) 11 SCC 720

- (b) The Bank Guarantee had been taken since PGCIL was implementing the dedicated transmission line to give connectivity of 2240 MW to the Appellant. The LTA has been granted for 250 MW as per the application of the Appellant. It comes at a subsequent stage.
- (c) In terms of the Connectivity Regulations and the Detailed Procedure, if any generator has given a Bank Guarantee at the stage of connectivity, the PGCIL cannot ask for a second Bank Guarantee at the time of grant of LTA. That does not mean that the Bank Guarantee dated 09.02.2011 is for connectivity and not for the LTA. The Bank Guarantee has been taken for the construction of the dedicated transmission line and has nothing to do with the payment security towards Long Term Access.

- (d) The invocation of Bank Guarantee is under the Transmission Agreement dated 03.01.2011 and not under the LTA Agreement dated 14.12.2011 (though there is an inadvertent error in the letter dated 12.10.2011).
- (e) The Appellant has acknowledged in its letters dated 06.07.2013 and 31.01.2014 that the transmission system was making adequate and good progress.
- (f) The question in the present case is pertaining to connectivity of 2240 MW and not LTA of 250 MW.
- (g) The Appellant is trying to take advantage of inadvertent errors in the letter dated 12.10.2017.
- (h) The invocation of Bank Guarantee cannot be under the LTA Agreement at all, since it is the Appellant's case that it does not need any LTA and has in fact

relinquished the LTA vide its letters dated 09.06.2016 and 11.04.2017.

- (i) The invocation of Bank Guarantee is consistent with the terms of the Transmission Agreement dated 03.01.2011.
- (j) The CERC has directed PGCIL to invoke the Bank Guarantee of the Appellant on account of adverse progress in its generating station and adjust the same towards capital cost of the dedicated transmission line set up by PGCIL.
- (k) The issue as to whether at all Bank Guarantee of Rs.112 Cr. should be given or it should be only Rs.12.05 Cr. has been decided by the CERC against the Appellant vide Order dated 29.01.2016 in Petition No.440/MP/2014. The Appellant's appeal against the said order is admitted by this Tribunal. Even if the Appellant succeeds in the said appeal, it is only a question of adjustment of

money. Invocation of Bank Guarantee cannot be stayed till these disputes are decided.

- (l) Directions given in Petition No. 187/MP/2015 with regard to encashment of Bank Guarantee stand modified by the CERC vide its Order dated 23.10.2017.
- (m) A Bank Guarantee is an independent contract and the invocation of the same cannot be interfered with by this Tribunal due to other contractual disputes between the parties. (See: **UP State Sugar Corporation v. Sumac International Limited**<sup>6</sup>; **Himadri Chemicals Industries Limited v. Coal Tar Refining Co.**<sup>7</sup>; **Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited & Anr.**<sup>8</sup> and order of this Tribunal dated

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<sup>6</sup> (1997) 1 SCC 568

<sup>7</sup> (2007) 8 SCC 110

<sup>8</sup> (2016) 10 SCC 46

**29.05.2017 in Shapoorji Pallonji Energy  
(Gujarat) Energy Limited v. GERC & GUVNL.)**

- (n) An error in the invocation letter cannot vitiate the invocation of Bank Guarantee (See: **DTH Constructions Pvt. Ltd. v. Steel Authority of India Ltd.**<sup>9</sup>; **DLF Industries Limited & Ors. v. Hongkong & Shanghai Banking Corporation & Ors.**<sup>10</sup>)
- (o) The conduct of the Axis Bank is in violation of the terms of the Bank Guarantee and the RBI Circular dated 01.07.2013.
- (p) Judgment of the Supreme Court in **Hindustan Construction** has no application to this case as there the Bank Guarantee was conditional, whereas in this case it is unconditional. The Appellant by misreading the provisions of the Bank Guarantee is seeking to convert an unconditional

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<sup>9</sup> (1986) Cal 91

<sup>10</sup> 1999 SCC Online Del 83 : 78 (1999) DLT 146

Bank Guarantee into a conditional bank Guarantee.

- (q) The Appellant has not come to this Tribunal with clean hands. It approached Delhi High Court though this Tribunal was available on 13.10.2017 and obtained an *ex parte* stay order. PGCIL was not given notice though it had filed a caveat.
- (r) **M/s Lajja Synthetics** has no application because PGCIL is not guilty of any suppression.
- (s) The invocation of Bank Guarantee is under the Transmission Agreement dated 03.01.2011, which is for the construction of the dedicated transmission line and not under the LTA Agreement dated 14.12.2011. Therefore, there is no question of partial invocation to the extent of Rs.12.5 Cr. as argued by the Appellant (See:

**Hindustan Engineering & Industries Limited**  
**v. Container Corporation of India Limited.**<sup>11)</sup>

- (t) PGCIL has spent about Rs.650 Cr. for construction of the transmission line. If encashment of Bank Guarantee is done, it would recover only Rs.112 Cr. The balance amount will have to be recovered by it after tariff finalization for which there is no payment security mechanism with PGCIL;
- (u) The Appellant neither has a prima facie case nor the balance of convenience is in its favour, hence the application be dismissed.

16. The Appellant is seeking interim order keeping in abeyance letter dated 12.10.2017 issued by PGCIL to Axis Bank in relation to invocation of Bank Guarantee of INR 112 Cr. The question involved in this application is whether the invocation of Bank Guarantee is bad in law.

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<sup>11</sup> 2005 SCC Online Del 341

17. We have entered the relevant facts here-in-above. It is clear that on 03.01.2011 Transmission Agreement dated 03.01.2011 was signed by and between the Appellant and PGCIL, whereunder PGCIL undertook to construct the transmission lines to evacuate 2240 MW. Admittedly, in terms of Clause 5.0 (b) of the Transmission Agreement, Bank Guarantee dated 09.02.2011 for an amount of Rs.112 Cr. was issued by the Appellant in favour of PGCIL. It would be advantageous to quote Clause 5 & 6 of the Transmission Agreement dated 03.02.2011.

*“5.0 (a) The M/s. Essar Power Gujarat Ltd (EPGL) shall not transfer its rights and obligations specified in the Transmission Agreement. The M/s. Essar Power Gujarat Ltd (EPGL) may relinquish its rights specified in the Transmission Agreement, subject to payment of compensation in accordance with the Regulations as amended from time to time.*

*(b) In case M/s Essar Power Gujarat Ltd (EPGL) fails/delays to utilize the connectivity provided or makes an exit or abandon its project, Powergrid shall have the right to collect the transmission charges and/or damages as the case may be in accordance with the notification/regulation issued by CERC from time to time. M/s. Essar Power Gujarat Ltd (EPGL) shall furnish a Bank guarantee for an amount which shall be equivalent to 5 (five) lakhs/MW as mentioned in the Detailed Procedure approved by the Commission, to partly compensate such damages. The bank guarantee format is enclosed as FORMAT CON-7. The details and categories of bank would be in accordance with clause 2(f) above. The Bank guarantee would be furnished in favour of*

*POWERGRID within 1(one) month of signing of the Agreement.*

*(c) This bank guarantee would be initially valid for a period upto six months after the expected date of schedule date of commissioning of the Transmission system indicated at Annexure-2. The bank guarantee would be encashed by POWERGRID in case of adverse progress assessed during coordination meeting as per para 6 below. However, the validity should be extended by M/s. Essar Power Gujarat Ltd. (EPGL) as per the requirement to be indicated during co-ordination meeting.*

*(d) In the event of delay in commissioning of the transmission system from its schedule, as indicated at Annexure-2. POWERGRID shall pay the transmission charges to M/s. Essar Power Gujarat Ltd (EPGL) proportionate to its capacity ready for connection. Provided further that POWERGRID fails to make alternate arrangement for dispatch of power.*

*6.0 In order to monitor/review the progress of connected systems alongwith connectivity, Joint Co-ordination meetings with representatives of M/S Essar Power Gujarat Ltd. (EPGL) and POWERGRID shall be held at regular intervals (preferably quarterly) after signing of this Agreement.”*

18. The Appellant applied for LTA for 250 MW and on 14.12.2011 the LTA Agreement dated 14.12.2011 was entered into between the Appellant and PGCIL.

19. It must be noted that at the time when Bank Guarantee was given LTA Agreement dated 14.12.2011 was not in existence. The Bank Guarantee for Rs.112 Cr. is not for LTA but for the

connectivity. Prima facie it appears to us that Bank Guarantee has been taken for the construction of dedicated transmission line and has nothing to do with the payment security towards Long Term Access.

20. It is now necessary to refer to paragraphs 44 and 45 of the impugned order, where the CERC has permitted PGCIL to encash the Bank Guarantee in terms of Article 5.0(c) of the Connectivity Agreement dated 03.01.2011. They read as under:

*“44. We have considered the submissions of the Petitioner and Respondent. The subject transmission line has been constructed as a connectivity line for evacuation of power from the Phase II of the generating station of the Petitioner. The Petitioner has claimed force majeure conditions for delay in the commissioning of the generation project. We have rejected the claim of the Petitioner for force majeure. Since the transmission system has been executed based on the connectivity granted and Transmission Agreement signed and the letter of the Petitioner dated 16.8.2011, the Petitioner has to either use it and pay the transmission charges or continue to pay the transmission charges till the transmission line is utilised or pay the relinquishment charges if it intends not to use the connectivity line. PGCIL is also entitled to encash the bank guarantee in terms of the Article 5.0 (c) of the Transmission Agreement on account of adverse progress of the*

*generation project. There is no provision for keeping the connectivity and LTA of the transmission line in abeyance which will result in non-recovery of the investment made. Further, the Petitioner cannot be exempted from paying the transmission charges for the subject transmission line. Accordingly, we reject prayers at para 5.2 and 5.3.*

45. *It has emerged during the analysis of various pleadings that the Petitioner was exploring utilisation of the subject transmission line by connecting to the bays in Phase I of the generation project. Since Phase I is dedicated to GETCO, the Petitioner is required to get consent of GETCO. We also notice that a number of wind and solar generation projects are coming up in Bachau area. CTU in consultation with CEA, GETCO and the Petitioner may explore the possibility of optimum utilisation of the Essar Gujarat TPS-Bachau 400 kV D/C (Triple) Line. Till alternative arrangements for utilisation of the said transmission line, the Petitioner shall continue to pay the transmission charges as determined by the Commission. As already held, PGCIL is at liberty to encash the bank guarantee for adverse progress of the generating station of the Petitioner and the same on recovering shall be adjusted against capital cost of the subject transmission projects.”*

21. At this stage we cannot express any final opinion on the merits of the case. So far as invocation of Bank Guarantee is concerned, law is well settled that the dispute between the beneficiary and the party at whose instance the Bank has given the Bank Guarantee, cannot prevent the Bank from honouring

the Bank Guarantee as the Bank Guarantee is an independent contract between the Bank and the beneficiary. We shall soon advert to the law. But suffice it to say for now that after detailed discussions, the CERC in the impugned order has rejected the plea of force majeure conditions claimed by the Appellant and has *inter alia* come to a conclusion that PGCIL has discharged its liability under the said Act, the Connectivity Regulations and the Transmission Agreement dated 03.01.2011. The CERC has further observed that it is the Appellant who failed to give a clear indication at the stage of investment approval of the transmission system that it is not executing the generation project and hence transmission system is not required. The CERC has further observed that the Appellant shifted the milestones for commercial operation of the generating station and accordingly PGCIL implemented the transmission system. After referring to several Co-ordination Committee meetings, the CERC has observed that the Appellant is merely seeking deferment of its operationalization and direction for non-payment of transmission system. Having marshalled and analysed the facts, the CERC has observed that PGCIL is entitled to encash the Bank Guarantee in terms of Article 5.0(c) of the Transmission

Agreement dated 03.01.2011. We *prima facie* feel that no fault could be found with the CERC's reasoning and direction.

22. Though there is absolute clarity in the direction given by the CERC, in the invocation letter dated 12.10.2011, PGCIL has committed an error and the Appellant is drawing support from that error. The invocation letter dated 12.10.2011 reads as under:

*"To,*

*The Branch Manager,  
Axis Bank Limited,  
Credit Management Centre – Mumbai  
Mumbai Fort (MH)  
Universal Insurance Building, Ground Floor,  
Sir PM Road, Fort,  
Mumbai – 400001.*

*SUB: Claim against the Bank Guarantee issued by you in favour of M/s. POWER GRID CORPORATION OF INDIA LIMITED (POWERGRID)*

*Dear Sir,*

*1.0 This has reference to Bank Guarantee issued by your bank in favour of POWE*

<b>BG No.</b>	<b>Date of Issue</b>	<b>Amount (In Rs. Cr.)</b>	<b>Expiry Date</b>	<b>Issued on behalf of</b>
0004010000 5273	09.02. 2011	112.0	04.11.2 017	M/s. Essar

				Power Gujarat Ltd.
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2.0 *M/s. Essar Power Gujarat Ltd. (EPGL) – the Developer, have signed a Long Term Access Agreement (LTAA) with POWERGRID on 14.12.2011 for 2240 MW Connectivity and 500 MW Long Term Access (LTA) for its generation project and submitted above stated construction bank guarantee as per the Clause 6.0 of above said Agreement, towards collection of transmission charges and/or damages, in case developer fails to construct the generating station/dedicated transmission system or make an exit or abandoned its project.*

3.0 *As per clause 6.0 of the LTA Agreement dated 14.12.211 signed by M/s. EGPL*

*..... The bank guarantee would be encashed by POWERGRID in case of adverse progress of individual generating unit(s) assessed during coordination meeting...*

4.0 *M/s. EGPS has failed to construct its and dedicated line as recorded in the minutes of Joint Coordination Committee Meetings with generation developers by POWERGRID. Further Central Electricity Regulatory Commission vide its order dated 11<sup>th</sup> of October, 2017 in Petition No. 187/MP/2015 have allowed POWERGRID to encash the bank guarantee for adverse progress of the generating station of the petitioner.*

5.0 *Accordingly we are forwarding this letter and deputing our officer Shri Jasbir Singh, Additional General Manager (Commercial), Power Grid Corporation of India Ltd., Gurgaon for encashment of above mentioned Bank Guarantee. He is fully authorized to complete all necessary formalities and procedures on behalf of POWERGRID and collect*

*proceeds against the encashment of above mentioned bank guarantee. Signature of Shri Jasbir Singh is attested as below.*

6.0 *You are, therefore, requested to remit the full guaranteed sum of Rs.112,00,00,000/- (Rupees One Hundred and Twelve Crore Only) towards proceeds of Bank Guarantee in the form of demand draft in favour of "Power Grid Corporation of India Ltd." payable at Gurgaon/New Delhi or wire transfer/RTGS/NEFT into POWERGRID account in Axis Bank Ltd., Gurgaon as per the details mentioned below:*

*Beneficiary Name: Power Grid Corporation of India Ltd.*

*Current Account No.: 911020062303780*

*Axis Bank Ltd., DLF Gurgaon*

*Branch*

*IFSC Code : UTIB0000131*

*Please make arrangements to immediately remit proceeds against BG to POWERGRID as above.*

*Thanking you,*

*Sd/-*

*Signature of Shri Jasbir Singh.*

*Yours faithfully,*

*Sd/-*

*(Abhay Choudhary)*

*Executive Director (Commercial & RC)"*

23. It is necessary now to reproduce the Bank Guarantee dated 09.02.2011. It reads as under:

*“In consideration of the Power Grid Corporation of India Ltd. (hereinafter referred to as the “POWERGRID” which expression shall unless repugnant to the context or meaning thereof include its successors, administrators and assigns) having signed an agreement dated 03.01.2011 with M/s. Essar Power Gujarat Ltd. with its Registered/Head office at Salaya Administrative Building, 44 KM, Jamnagar-Okha Highway, Post Box No.7, at Post – Khambhallya, Dist. Jamnagar-361305, Gujarat (hereinafter referred to as the “CUSTOMER” which expression shall unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns).*

*WHEREAS it has been agreed by the customer in the said Agreement that in case of failure/delay to construct the generating station or making on exit or abandonment of its project by CUSTOMER. POWERGRID shall have the right to collect the estimated transmission charges of stranded transmission capacity for dedicated line at the rate mentioned in the Detailed Procedure as approved by the Commission, to compensate such damages.*

*AND WHEREAS as per the aforesaid agreement customer is required to furnish a Bank Guarantee for a sum of Rs.112,00,00,000/- (Rupees One Hundred Twelve Crores only) as a security for fulfilling its commitments to POWERGRID as stipulated in the said Agreement.*

*We, Axis Bank Ltd., Axis Bank Ltd., a company within the meaning of Companies Act, 1956 and licensed as a bank under Banking Regulation Act, 1949 and having its registered office at ‘Trishul’, Third Floor, Opp.*

*Samartheshwar Temple, Near Law Garden Ellisbridge, Ahmedabad- 380 006 and branch office amongst other places at Universal Insurance Building, Sir P.M. Road, Fort, Mumbai 400 001 (hereinafter referred to as the "Bank" which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns) do hereby guarantee and undertake to pay the POWERGRID on demand any and all monies payable by the CUSTOMER to the extent of Rs.112,00,00,000/- (Rupees One Hundred Twelve Crores Only) as aforesaid at any time upto 04.11.2014 (day/month/year) without any demur, reservation, context or protest and/or without any reference to the CUSTOMER.*

*Any such demand made by the POWERGRID on the Bank shall be conclusive and binding notwithstanding any difference between the POWERGRID and the CUSTOMER or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. The Bank undertakes not to revoke this guarantee during its currency without previous consent of the POWERGRID.*

*The POWERGRID shall have the fullest liberty without affecting in any way the liability of the Bank under this guarantee, from time to time to extend the time for performance of the obligations under the said agreement by the CUSTOMER. The POWERGRID shall have the fullest liberty, without affecting this guarantee, to postpone from time to time the exercise of any powers vested in them or of any right which they might have against the CUSTOMER, and to exercise the same at any time in any manner, and either to enforce or to forbear to enforce any covenants, contained or implied, in the Agreement between the POWERGRID*

*and the CUSTOMER or any other course or remedy or security available to the POWERGRID. The Bank shall not be released of its obligations under these presents by any exercise by the POWERGRID of its liberty with reference to the matters aforesaid or any of them or by reason or any other act of omission or commission on the part of the POWERGRID or any other indulgences shown by the POWERGRID or by any other matter or thing whatsoever which under law would, but for this provision have the effect of relieving the Bank.*

*The Bank also agrees that the POWERGRID at its option shall be entitled to enforce this Guarantee against the Bank as a principal debtor. In the first instance, without proceeding against the CUSTOMER and not withstanding any security or other guarantee the POWERGRID may have in relation to the CUSTOMER'S liabilities.*

*Our liability under this guarantee is restricted to Rs.112,00,00,000/- (Rupees One Hundred Twelve Crores Only) and it shall remain in force upto and including 04.11.2014 and may be extended from time to time for such period, as may be desired by M/s Essar Power Gujarat Limited on whose behalf this guarantee has been given.*

24. It is clear from a careful perusal of the Bank Guarantee dated 09.02.2011 that it refers to the Transmission Agreement dated 03.01.2011. In the first paragraph there is clear reference to it and the succeeding paragraphs advert to it. However the

invocation letter dated 12.10.2011 refers to LTA Agreement dated 14.12.2011. This is stated to be an inadvertent mistake and is clearly a mistake. The clause is wrongly quoted as 6.0. Paragraph 4.0 however correctly refers to the CERC's Order dated 11.10.2017 in Petition No. 187/MP/2015 whereby the CERC has allowed PGCIL to encash the Bank Guarantee due to adverse progress of the generating station of the Appellant. The description of the Bank Guarantee given in paragraph No.1 is correct. The question is what is the effect of such incorrect letter of invocation.

25. It is well settled that invocation of the Bank Guarantee must be in terms of the Bank Guarantee. In this connection, we must usefully refer to the judgment of the Supreme Court in **Hindustran construction.** The Supreme Court has observed as under:

*“9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent*

*contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.”*

26. It is pertinent to note that in this case the Supreme Court went on to observe that since the Bank Guarantee was furnished to the Chief Engineer and there was no definition of Chief Engineer in the Bank Guarantee nor was it provided therein that ‘Chief Engineer’ would also include ‘Executive Engineer’, the Bank Guarantee could be invoked by none except the Chief Engineer. The Supreme Court observed that the invocation done by the Executive Engineer was wholly wrong and the Bank was under no obligation to pay the amount. Thus the Supreme Court unambiguously emphasised the importance of accuracy of the letter of invocation.

27. Similar view has been taken by the Bombay High Court in its Judgment dated 20.06.2016 in **Larsen and Toubro Limited v. Allahabad Bank in Appeal (L) No. 106/16.** While following the observations of the Supreme Court in **Hindustan Construction** the Bombay High Court observed as under:

*“12 **The law with regard to the binding effect of terms of PBG is quite settled** as is observed in paragraph Nos. 32, 39 and 49, in the Judgment in United Commercial Bank (Supra).*

***The strict compliances of the terms of PBG is therefore, mandatory.** The same view is further reiterated in Hindustan Construction Co. Ltd (supra) in paragraph No.9, which reads thus:-*

*“9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. **The terms of the bank guarantee are therefore, extremely material, since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.**”(Emphasis supplied)*

28. Counsel for Respondent No.2 has tried to distinguish **Hindustan Construction** on the ground that in that case the Bank Guarantee was conditional, whereas in this case it is unconditional. We are unable to accept this submission. The

fact that the Bank Guarantee in that case was conditional does not dilute the principle laid down by the Supreme Court that the invocation of the Bank Guarantee has to be in terms of the Bank Guarantee or else the invocation itself is bad in law.

29. Reliance is placed by counsel for Respondent No.2 on the judgment of learned Single Judge of the Calcutta High Court in

**DTH Constructions**. Following is the relevant extract:

*“If the bank has understood the purport of the notice, which no doubt the bank well understood, then the bank cannot be heard to say that there has been no statement in the notice that the defendant No.1 has suffered loss and/or damages on account of the defaults committed by the plaintiff. Even if the notice was bad that will not help the bank ultimately because the defendant No.1 could give a fresh notice strictly in compliance with the language and words of the guarantee to the bank. If there is substantial compliance with the terms of the guarantee in the notice that would be sufficient and if there be no defect in understanding the nature and purport of such notice by the Bank, the bank is bound to honour its commitment under the guarantee.”*

In our opinion, reliance placed on this judgment is misplaced. In that case, the Bank Guarantee stated that the Bank would indemnify Defendant No.1 against all losses and damages that may be caused to Defendant No.1 by reason of

defaults committed by the Plaintiff. It was submitted that although it was alleged that default has been committed there was no mention in the letter of invocation that any loss or damages have been suffered by Defendant No.1. It is in this context that learned Single Judge of the Calcutta High Court observed that if the letter of invocation is not strictly in accordance with the language of the Bank Guarantee that would not be an excuse for the Bank not to make payment and if the Bank has understood the purport of the notice then the Bank cannot avoid its liability. In the facts of that case, learned Single Judge observed that there was substantial compliance with terms of the Bank guarantee. There was no wrong statement made in the letter of invocation in that case. Surely therefore **DTH Constructions** can have no application to this case. When the letter of invocation quotes wrong agreement and wrong clause, it cannot be said that there is substantial compliance with the terms of the Bank Guarantee.

30. Similarly, the Delhi High Court's Judgment in **DLF Industries** is also not applicable to this case. There learned Single Judge of the Delhi High Court took a view that the

invocation letter need not reproduce all the words of the Bank Guarantee like a parrot. In that case there was no wrong statement or quoting of wrong agreement or wrong clause of the agreement mentioned in the Bank Guarantee. Facts of this case cannot be equated with the facts of the present case.

31. We are deeply anguished at the casual manner in which PGCIL a Government Company has issued the letter of invocation of Bank Guarantee involving a huge sum of Rs.112 Cr. This is not a case where it can be said that all the details stated in the Bank Guarantee are not quoted word by word. This is not a case where there is a small typographical error of no consequence. This is a case of a glaring error which cannot be glossed over by what precedes it or what follows it. If such invocation letters are approved by this Tribunal, it would set a bad precedent. Invocation of Bank Guarantee is not a light matter and as said by the Supreme Court in **Hindustan Construction** it has to be done strictly in accordance with the terms of the Bank Guarantee. This is not a case where one can say that the Bank must have understood the purport of the

letter of invocation and it must honour it. Such glaring mistakes cannot be condoned on such untenable assumption.

32. So far as the law on invocation of Bank Guarantee is concerned, it is well settled by a catena of judgments of the Supreme Court. In **Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd & Anr.**<sup>12</sup>, the Supreme Court observed as under:

*“4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.*

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<sup>12</sup> (1996) 5 SCC 450

5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief. The question, therefore, is whether the petitioner had made out any case of irreparable injury by proof of special equity or fraud so as to invoke the jurisdiction of the Court by way of injunction to restrain the first respondent from encashing the bank guarantee. The High Court held that the petitioner has not made out either. We have carefully scanned the reasons given by the High Court as well as the contentions raised by the parties. On the facts, we do not find that any case of fraud has been made out. The contention is that after promise to extend time for constructing the buildings and allotment of extra houses and the term of bank guarantees was extended, the contract was terminated. It is not a case of fraud but one of acting in terms of contract. It is next contended by Shri G. Nageshwara Rao, the learned counsel for the petitioner, that unless the amount due and payable is determined by a competent court or tribunal by mere invocation of bank guarantee or letter of credit pleading that the amount is due and payable by the petitioner, which was disputed, cannot be held to be due and payable in a case. The Court has yet to go into the question and until a finding after trial, or decision is given by a court or tribunal that amount is due and payable by the petitioner, it cannot be held to be due and payable. Therefore, the High Court

*committed manifest error of law in refusing to grant injunction as the petitioner has made out a prima facie strong case. We find no force in the contention. All the clauses of the contract of the bank guarantee are to be read together. Bank guarantee/letters of credit is an independent contract between the bank and the beneficiary. It does not depend on the result of the dispute between the person on whose behalf the bank guarantee was given by the bank and the beneficiary. Though the question was not elaborately discussed, it was in sum answered by this Court in Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.<sup>1</sup> (SCC at p. 79). This Court had held in para 6 that the entire dispute was pending before the arbitrator. Whether, and if so, what is the amount due to the appellant was to be adjudicated in the arbitration proceedings. The order of the learned Single Judge proceeds on the basis that the amounts claimed were not and cannot be said to be due and the bank has violated the understanding between the respondent and the bank in giving unconditional guarantee to the appellant. The learned Judge held that the bank had issued a guarantee in a standard form, covering a wider spectrum than agreed to between the respondent and the bank and it cannot be a reason to hold that the appellant is in any way fettered in invoking the conditional bank guarantee. Similarly, the reasoning of the learned Single Judge that before invoking the performance guarantee the appellant should assess the quantum of loss and damages and mention the ascertained figure, cannot be put forward to restrain the appellant from invoking the unconditional guarantee. This reasoning would clearly indicate that the final adjudication is not a precondition to invoke the bank guarantee and that is not a ground to issue injunction restraining the beneficiary to enforce the bank guarantee. In Hindustan Steelworks Construction Ltd. v. Tarapore & Co.<sup>2</sup>, it was contended that a contractor had a counter-claim against the appellant; that disputes had been referred to the arbitrator and no amount was said to be due and payable by the contractor to the appellant till the*

*arbitrator declared the award. It was contended therein that those were exceptional circumstances justifying interference by restraining the appellant from enforcing the bank guarantee. The High Court had issued interim injunction from enforcing the bank guarantee. Interfering with and reversing the order of the High Court, this Court has held in para 23 that a bank must honour its commitment free from interference by the courts. The special circumstances or special equity pleaded in the case that there was a serious dispute on the question as to who has committed the breach of the contract and that whether the amount is due and payable by the contractor to the appellant till the arbitrator declares the award, was not sufficient to make the case an exceptional one justifying interference by restraining the appellant from enforcing the bank guarantee. ....”*

33. After referring to **U.P. State Sugar Corporation, Mahatma Gandhi Sahakara Sakkare Karkhane v. National Heavy Engineering Cooperative Limited & Anr.**<sup>13</sup>, **Vinitec Electronic Private Limited v. HCL Infosystem Ltd.**<sup>14</sup>, **Adani Agri Fresh v. Mehboob Shariff & Ors.**<sup>15</sup> and **Gujarat Maritime Board**, this Tribunal has in **Shapoorji Pallonji** summarised the law as under:

*“31. The principles laid down by the Supreme Court can be summarized as follows: The Bank Guarantee is an independent contract between the bank and the*

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<sup>13</sup> (2007) 6 SCC 470

<sup>14</sup> (2008) 1 SCC 544

<sup>15</sup> AIR 2016 SC 92

beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable Bank Guarantee. The dispute between the beneficiary and party, at whose instance the bank has given the guarantee is immaterial and is of no consequence. The liability of the bank is absolute and unequivocal. The bank has to only verify whether the amount claimed is within the terms of the Bank Guarantee or Letter of Credit. Any payment by the bank would obviously be subject to the final decision of the court or the tribunal. At the stage of invocation of Bank Guarantee, there is no need for final adjudication and decision on the amount due and payable by the person giving the Bank Guarantee. The Courts should not interfere with invocation and encashment of Bank Guarantee unless there is fraud of egregious nature of which the beneficiary seeks to take advantage and which vitiates the entire underlying transaction or a case where irretrievable injustice is likely to be caused to either of the parties. That is to say, there must be special equities in favour of injunction such as when irretrievable injury or irretrievable injustice would occur if injunction were not granted. Since in most cases payment of money under a Bank Guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. There is no question of making out any prima facie case much less strong evidence or special equity for interference by way of injunction by the court in preventing encashment of Bank Guarantee. The bank must honour Bank Guarantees free from interference by the courts, otherwise trust in commerce, internal and international would be damaged irreparably. There has to be glaring circumstances of deception or fraud warranting interference. Final adjudication is not a pre-condition to invoke the Bank Guarantee and that is not a ground to issue injunction restraining the beneficiary from enforcing the Bank Guarantee. The mere fact that

*the Bank Guarantee refers to the principle agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. The present case can be examined in the light of these principles.”*

34. We have quoted the Bank Guarantee dated 09.02.2011 hereinabove. It is unambiguous and unconditional. Examined in the light of the above judgments and taking into consideration the direction given by the CERC in its judgment dated 11.10.2017, we are of the view that the dispute raised by the Appellant against PGCIL cannot restrain the Axis Bank from honouring the Bank Guarantee if it is properly invoked.

35. It is pointed out to us that the Appellant had filed Petition No.440/MP/2014 in the CERC on the question of quantum of Bank Guarantee that the Appellant, is required to furnish to PGCIL. The Appellant questioned the entitlement of PGCIL to the quantum of Bank Guarantee under the Transmission Agreement dated 03.01.2011 and the LTA Agreement dated 14.12.2011. On 29.01.2016, the CERC passed order in the said petition. While disposing of the petition, the CERC directed the Appellant to extend the Bank Guarantee of INR 112 Cr. for 2240 MW

corresponding to the capacity of the connectivity line till opening of payment security mechanism and operationalization of LTA. PGCIL was directed not to encash the Bank Guarantee till the opening of payment security mechanism for operationalization of LTA. The appeal filed by the Appellant challenging the said order being Appeal No.237 of 2017 is admitted by this Tribunal, however, there is no stay of the said order. On 11.10.2017, the CERC disposed of Petition No.187/MP/2015. The said order is impugned in this appeal. As already noted, the CERC has permitted PGCIL to encash the instant Bank Guarantee for adverse progress of the Appellant's generating station.

36. It is pointed out to us that as the Appellant had relinquished the LTA and the stage of operationalization of LTA will not come at all, PGCIL moved IA No.47 of 2016 before the CERC stating that since the LTA would not be operationalised at all, the order dated 29.01.2016 of the CERC is not implementable. The CERC disposed of the said application vide its order dated 23.10.2017 holding the following:

*“10. The Commission in its order dated 11.10.2017 in Petition No.187/MP/2015 held that the Petitioner EPGL*

is not affected by force majeure and its case is not covered under Clause 8.0 of the Transmission Service Agreement. The Commission further held that the Petitioner EPGL is liable to pay the transmission charges unless it relinquished connectivity on payment of relinquishment charges for the connectivity line. The Commission also held that PGCIL has discharged its responsibility under the Act, Connectivity Regulations and the Transmission Agreement dated 3.1.2011 in this case while implementing the connectivity line and it is the Petitioner EPGL who failed to give a clear indication that the transmission lines were not required and kept on shifting the milestones of commercial operation of its generating station. As regards the prayer for keeping the connectivity and LTA in abeyance, the Commission held that there was no provision for keeping the connectivity and LTA of the transmission line in abeyance which would result in non-recovery of the investment made. The Commission also indicated a roadmap for utilisation of the connectivity line in para 45 of the said order and directed the EPGL to pay the transmission charges till alternative arrangement for utilisation of the connectivity line is made. The Commission permitted PGCIL to encash the bank guarantee on account of the adverse progress of the generating station in terms of the Transmission Service Agreement which on its recovery would be adjusted against the capital cost of the subject transmission lines.

11. The directions in Petition No. 440/MP/2014 were made after taking note of the fact that the Petition No.187/MP/2015 pertaining to the same transmission system was under consideration of the Commission. In the light of the direction in order dated 11.10.2017 in Petition No.187/MP/2015 with regard to the encashment of bank guarantee, the directions in para 25 (b) of the order dated 29.1.2016 shall stand modified accordingly.

12. In view of the above, IA No. 47/2016 in Petition No.440/MP/2014 filed by PGCIL has been rendered

*infructuous. We, therefore, do not consider it necessary to deal with the pleas of the Applicant, PGCIL and Respondent, EPGL in the IA.*

*13. IA No.47 of 2016 in Petition No.440/MP/2014 is disposed of in terms of the above.”*

37. It is clear, therefore, that even if the Appellant succeeds in Appeal No.237 of 2017, it is only a question of adjustment of money. The invocation of Bank Guarantee dated 09.02.2011 cannot be stayed till the disputes between PGCIL and the Appellant are settled. That would be contrary to the law laid down by the Supreme Court which we have summarised hereinabove.

38. We would also like to state that the allegation that PGCIL misled the Bank, deserves to be rejected. The letter of invocation dated 12.10.2011, no doubt, contains mistakes. PGCIL should have been more careful while drafting the letter. But, we do not see any oblique motive to mislead the Bank as alleged.

39. Mr. Sen, learned counsel for the Appellant has placed heavy reliance on the Supreme Court's judgment in **Gangotri**. In our

opinion, the Appellant cannot draw any support from the judgment as the facts of that case are clearly distinguishable from the facts of the present case. In that case, the Bank Guarantee was in the nature of a Performance Guarantee furnished for execution work of contract dated 14.07.2006 which was completed. The Supreme Court observed that the work having been completed to the satisfaction of the Respondents therein they had no right to encash the Bank Guarantee. The Supreme Court made it clear in that case that there can be no dispute about the general principles relating to Bank Guarantee as laid down in **U.P. State Sugar Corporation** and other leading cases. **Gangotri**, therefore, has no application to the present case.

40. In the ultimate analysis, though we *prima facie* concur with the view taken by the CERC in the impugned order about the adverse progress of the generating station of the Appellant and we approve the liberty given to PGCIL to encash the Bank Guarantee dated 09.02.2011, we stay the invocation letter dated 12.10.2011 as not being in terms of the Bank Guarantee dated 09.02.2011 on account of admitted glaring mistakes contained

therein. It will however be open to PGCIL to withdraw the letter of invocation dated 12.10.2011, on account of mistakes contained therein and issue a fresh letter of invocation. The present stay order will not come in the way of PGCIL from doing so. The interim application is disposed of in the aforestated terms.

41. List the main appeal for hearing on **18/12/2017**.

42. Pronounced in the Open Court on this **22<sup>nd</sup> day of November, 2017**.

**I.J. Kapoor**  
**[Technical Member]**

**Justice Ranjana P. Desai**  
**[Chairperson]**